Toffoloni v. LFP Publishing Group, LLC Doc. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC,** d/b/a Hustler Magazine, et al, Defendant.	)))))))))))))	CASE NO. 1:08-cv-00421-TWT

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY AND, IN THE ALTERNATIVE, RULE 56(f) MOTION FOR AN EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al. ("LFP") and respectfully submits this Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment as to Liability and, in the Alternative, Rule 56(f) Motion for an Extension of Time to Respond to Plaintiff's Summary Judgment Motion. As shown below, and as demonstrated by the affidavit of LFP counsel submitted herewith, Plaintiff's motion is premature and

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should be denied for lack of proof; or, in the alternative, discovery is needed before LFP may fully respond to the motion.

I. INTRODUCTION

Plaintiff has moved for summary judgment on the issue of liability before discovery in this action even began. She asserts that the Eleventh Circuit's holding -- on review of an order granting a Rule 12(b)(6) motion to dismiss -- that the "newsworthiness exception" to the Georgia common law right of publicity does not apply to LFP's posthumous publication of images of Nancy Benoit means that she has not only stated a claim, but already established LFP's liability in tort based upon the bare, unproven allegations of her Complaint alone. This assertion is incorrect for two reasons.

First, because the Eleventh Circuit's review of Plaintiff's Complaint was pursuant to Fed. R. Civ. P. 12(b)(6), its holding is necessarily limited to a ruling that, based on the present state of the record, including Plaintiff's unproven factual allegations, the "newsworthiness exception" to the Georgia right of publicity does not preclude Plaintiff from stating a claim. As a matter of well-settled law and due process, the Eleventh Circuit's holding cannot be deemed to have decided unproven issues of fact or the underlying merits of the case.

Second, summary judgment is not appropriate because there are several material, unresolved questions of fact necessary to any finding of liability which are in dispute and require proof from Plaintiff and third-parties, including, *inter alia*:

(1) whether Plaintiff is the real-party-in-interest with legal standing to assert a posthumous claim for right of publicity on behalf of Ms. Benoit, or whether that right belongs to some other individual(s) or entity pursuant to a conveyance such as a license or assignment;

(2) whether, as alleged but not yet proven, Ms. Benoit did not in fact sign a release or otherwise authorize the publication of the images;

(3) what exploitation of her image was done by Ms. Benoit in her lifetime; and

(4) whether Ms. Benoit or Plaintiff ever intended or intends to exploit commercially the images at issue in this lawsuit.

Simply put, at this stage of the litigation, before any discovery, the record is not ripe for summary adjudication. Accordingly, Plaintiff's motion for partial summary judgment as to liability should be denied.

In the alternative, LFP respectfully moves this Court to continue any consideration of Plaintiff's request for partial summary judgment until LFP has had an opportunity to conduct discovery, and requests that this Court allow LFP to respond to Plaintiff's Motion within twenty days of the expiration of discovery.

II. PROCEDURAL POSTURE OF THE CASE

Plaintiff's Complaint asserts one substantive claim for violation of Ms. Benoit's common law right of publicity based on the following allegations of fact:

(1) Plaintiff is authorized to sue on behalf of Ms. Benoit's estate, Cmplt. ¶ 1;

(2) Nude and partially-nude photographs and video images of Ms. Benoit were taken by Defendant Mark Samanksy with her consent and voluntary participation, but Ms. Benoit did not sign a release or otherwise give Samansky permission or authorization to publish or use the images, *id*. at ¶¶ 9-12 & 17;

(3) Ms. Benoit never wished for the images to be published by anyone, *id*. at ¶¶ 12-14;

(4) LFP published the images over Plaintiff's objection, *id*. at ¶¶ 18-21; and

(5) LFP's purpose in publishing the images was to "exploit [Ms. Benoit's] image for their [sic] own commercial purposes," *id*. at ¶ 30.

LFP moved to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6), which motion argued that even if these factual allegations were proven and undisputed, which they are not, Plaintiff's Complaint did not state a claim on which relief may be granted because the alleged conduct was both outside of the scope of the Georgia right of publicity and privileged under the First Amendment to the U.S. Constitution. (Docket Index ("D.I." 10-2.) This Court agreed, and entered an order dismissing the Complaint pursuant to Rule 12(b)(6). (D.I. 13.)

On appeal, the Eleventh Circuit "review[ed] the district court's grant of LFP's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), *de novo*," *Toffoloni v. LFP Publishing Group*, LLC, 572 F.3d 1201, 1208 (2009) (emphasis in original), which required the court to assume the facts asserted in Plaintiff's Complaint were true and undisputed. Relying in part on Plaintiff's yet-unproven allegation that Benoit did not wish photos to become public, the Eleventh Circuit held that, based upon the facts alleged but yet unproven, the "newsworthiness" exception to the Georgia right of publicity did not preclude Plaintiff from stating a claim. *See id.*, 572 F.3d at 1211 ("LFP may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered.") (emphasis added).

Upon remand from the Eleventh Circuit, LFP timely filed its Answer to the reinstated, but still unproven, Complaint. (D.I. 33.) LFP's Answer shows that each of the factual allegations Plaintiff asserts in support of her claim is either unproven, disputed in whole or in part, or both. (*Id.* at ¶¶ 1, 9-14, 17-21 & 30.)[1]

Per N.D.Ga. LR 26.2(A), discovery commenced October 28, 2008. Plaintiff has served interrogatories and requests for production of documents on LFP. (D.I. 51.)[2] LFP has also served its first interrogatories and document requests upon Plaintiff, D.I. 54, responses to which are not due until December 7, 2009. LFP anticipates deposing Plaintiff as well as a number of non-parties likely or exclusively known to Plaintiff but not yet identified, including Ms. Benoit's entertainment industry agents, business partners, employers, and other similarly situated persons with knowledge of Ms. Benoit's efforts to exploit her image and to license or contract her rights to do so to others. (Bauer Affid. at ¶ 8.)

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[1] LFP does not deny publishing the images of Ms. Benoit at issue; but LFP does deny publishing them despite Plaintiff's objection, which the evidence will show was made *after* the publication occurred.

[2] Plaintiff's discovery requests were served before the discovery period began; by agreement of counsel the parties have stipulated that LFP's responses will be due November 30, 2009. (Exhibit 1 hereto, Affidavit of S. Derek Bauer, Esq. ("Bauer Affid.") at ¶ 5.)

III. LEGAL STANDARDS

A. Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

The party seeking summary judgment bears the burden of proving the absence of a genuine dispute as to any material fact. *Herzog v. Castle Rock Entm't*, 193 F. 3d 1241, 1246 (11th Cir. 1999). Once the moving party puts forth such proof, the burden then shifts to the non-moving party, which must go beyond the pleadings and present evidence showing that a genuine issue of material fact does in fact exist. *Burchfield v. CSX Transp., Inc.*, 2009 WL 1405144, at *2 (N.D.Ga. 2009) (Thrash, J.). A fact is "material" if a dispute over that fact will affect the outcome of the suit under the law; an issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Peterson v. Sprock*, 2009 WL 383582, at *2 (N.D.Ga. 2009) (denying motion for partial summary judgment due to existence of issues of material fact) (Story, J.).

In the context of a summary judgment motion, the Court must view all evidence "in a light most favorable to the party opposing the motion and must resolve all reasonable doubts in the non-movant's favor." *Willis v. Ralph Hardie's Restaurant No. 2, Inc.*, 2009 WL 3273929, at *1-2 (N.D.Ga. 2009) (citing *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of Am.*, 894 F.2d 1555, 1558 (11th Cir. 1990)) (Duffy, J.). Indeed, a party is entitled to summary judgment only where "the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict." *Chambers v. Zesto Enterprises, Inc.*, 2009 WL 3200682, at *2 (N.D.Ga. 2009) (citation omitted) (Duffy, J.).

B. Rule 56(f)

Rule 56(f) prevents a party from having to respond prematurely to a motion for summary judgment where discovery is necessary and appropriate to respond to the motion. Fed. R. Civ. P. 56(f); *Denton v. U.S.*, 2006 WL 1734261, *3 n.2 (N.D. Ga. 2006) (Rule 56(f) is designed to protect a party against the "precipitous entry of summary judgment") (Vining, J.). Specifically, the Rule provides:

> If a party opposing [a summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

Fed. R. Civ. P. 56(f).

Whether to grant a Rule 56(f) request is within the discretion of the trial court. *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1280 (11th Cir. 1998). It is well-established in this Circuit that "summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery." *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988). In *Snook*, the Eleventh Circuit explained:

> The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests.

Id. (Cits. omitted.)

Further, "[b]efore entering summary judgment the district court must ensure that the parties have an adequate opportunity for discovery." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). "Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (emphasis added); *see also Burks v. American Cast Iron Pipe Co.*, 212 F.3d 1333 (11th Cir. 2000) (premature entry of summary judgment without allowing for discovery reversible error).

As this Court has held, "[i]n a typical situation, Rule 56(f) is applied where the opposing party is unable to justify his opposition because knowledge of the relevant facts is exclusively with or largely within the control of the moving party." *Parks v. Doan*, 2007 WL 1482770 at *5 (N.D. Ga. 2007) (Thrash, J.) (quoting *Denton*, 2006 WL 1734261 at *3 n.2).

IV. ARGUMENT AND CITATION TO AUTHORITY

A. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO LIABILITY ON THE PRESENT RECORD

1. The Eleventh Circuit Decision Reversing This Court's Dismissal Pursuant To Rule 12(b)(6) May Not Properly Be Construed To Have Adjudicated Liability

Plaintiff's motion for partial summary judgment is premised on her argument, D.I. 50-2 at 3, that "liability has been finally and conclusively established by the Court of Appeals" in its decision reversing this Court's order dismissing Plaintiff's Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). But that assertion must fail because, as a matter of long-settled due process law, "the purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief. A motion to dismiss concerns only the complaint's legal sufficiency and is not a procedure for resolving factual questions or for addressing the merits of the case." *F.T.C. v. Citigroup Inc.*, 2001 WL 1763439, at *2 (N.D.Ga. 2001) (Carnes, J.); *see also* Wright & Miller, Federal Practice and Procedure: Civil 3d at § 1356 (same); *Scheuer v. Rhodes*, 416 U.S. 232, 250, 94 S.Ct. 1683 (1974) ("We intimate no evaluation whatever as to the merits of the petitioners' claims or as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.").

Appellate review of a Rule 12(b) motion thus cannot establish the "law of the case" on any fact-dependent issue, much less liability, where discovery may, but has yet to, reveal whether the allegations in the Complaint are in fact supported by evidence. *See, e.g., McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) ("[O]ur holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery."). This is true, of course, because the courts are not permitted to make factual findings when reviewing a Rule 12(b)(6) motion, but must instead assume the facts alleged to be true for the limited purpose of evaluating whether Plaintiff has stated a claim. *Murphy v. F.D.I.C.*, 208 F.3d 959, 962 (11th Cir. 2000); *see also Roth v. Jennings*, 489 F.3d 499, 508 (2nd Cir. 2007) ("In any event, a ruling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact."); *Northington v. Jackson*, 973 F.2d 1518, 1524 (10th Cir. 1992) (fact-finding by court "impermissible" on review of 12(b)(6) motion); *In re Consolidated Industries*, 360 F.3d 712, 717 (7th Cir. 2004) ("Of course, a judge reviewing a motion to dismiss under Rule 12(b)(6) cannot engage in fact-finding."); *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 700 (9th Cir. 2004) ("[T]he court may not make fact findings of a controverted matter when ruling on a Rule 12(b)(6) motion."). For this very reason, the "law of the case" doctrine does not authorize entry of summary judgment based on an appellate court's "assumption" of proven facts. Indeed, in deciding that the "newsworthiness" defense did not, on the pleadings alone, preclude Plaintiff from stating her claim, the Eleventh Circuit relied on Plaintiff's unproven allegation that Ms. Benoit wished for the images published by LFP to remain private: "LFP may not make public private, nude images of Benoit that she, allegedly, expressly did not wish made public, simply because she once wished to be a model and was then murdered." *Toffoloni*, 572 F.3d at 1211 (emphasis added).

In short, the Eleventh Circuit's decision on review of this Court's order dismissing this case pursuant to Fed. R. Civ. P. 12(b)(6) does not absolve Plaintiff of her obligation to prove the facts in support her claim, including, *inter alia*, that she is the real party in interest with the right to pursue her claim. Standing alone, the Eleventh Circuit decision in *Toffoloni* does not provide a basis for entry of summary judgment on liability against LFP. *See, e.g., Lu v. Zurich American Ins. Co*., 115 Fed. Appx. 613 (4th Cir. 2004) (a "Rule 12(b)(6) order, standing alone, cannot suffice as a final order of judgment.").

2. The Existence of Genuine Disputes of Material Fact Precludes Summary Judgment As To Liability On Plaintiff's Claim

There remain unproven facts and allegations essential to Plaintiff's right to recover on her claim for right of publicity. These unproven questions of fact preclude summary judgment at this juncture.

Specifically, to establish liability on her claim, Plaintiff, who purports to sue on behalf of Ms. Benoit's Estate, must prove that:

(1) she is the owner of her claim, i.e., the right to exploit Ms. Benoit's image and likeness, and is therefore the real party in interest;

(2) the images published by LFP were or are intended for commercial exploitation by Ms. Benoit or Plaintiff;[3]

(3) LFP's publication of the images of Ms. Benoit was not authorized by Ms. Benoit or someone with authority to act on her behalf;

(4) LFP's publication of the images of Ms. Benoit was for "commercial purposes," as that term is defined for purposes of the Georgia common law claim for right of publicity;

(4) LFP was unjustly enriched by its publication of the images of Ms. Benoit; and

(5) LFP's publication of the images is not protected by the First Amendment to the U.S. Constitution.

See Cabaniss v. Hinsley, 114 Ga.App. 367 (1966); *Martin Luther King, Jr. Center v. American Heritage Products*, 250 Ga. 135 (1982); *Waters v. Fleetwood*, 212 Ga. 161 (1956); *Time v. Hill*, 385 U.S. 374, 87 S.Ct. 534 (1967); *and Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 97 S.Ct. 2849, 2856 (1977).

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[3] *See, e.g.*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573, 97 S.Ct. 2849, 2856 (1977): "The State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment." The focus of such a claim is "on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation," and presupposes that the claimant has an interest in making his "act" public and profiting therefrom, and thus "the only question is who gets to do the publishing." *Id.*

Because there remain open questions of fact with respect to each of these elements, summary judgment is not appropriate on this record.

B. IN THE ALTERNATIVE, DEFENDANT SHOULD BE PERMITTED TIME TO COMPLETE NECESSARY AND PERTINENT DISCOVERY BEFORE RESPONDING TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The discovery period in this case has only just commenced; the parties' first discovery responses are not even due until the end of November and early December, respectively. Plaintiff not only served her written discovery before the discovery period commenced, but on the same day she filed her motion for partial summary judgment, and after LFP counsel had made clear to her counsel that it required substantial discovery to defend Plaintiff's claim. (Bauer Affid. at ¶¶ 4 & 5.)

LFP has been diligent in seeking discovery, having served its first interrogatories and document requests to Plaintiff within the first week after commencement of the discovery period, D.I. 54, but has not yet obtained Plaintiff's responses (which are not even due until December 7, 2009). Further, and significantly, nearly all of the essential facts needed to be discovered by LFP for its defense, including the names of Ms. Benoit's agents, licensees, business partners, etc. are within the control or personal knowledge of Plaintiff. (Bauer

Affid. at ¶ 8.)[4] Having not yet obtained any written discovery, including such basic and essential materials as Ms. Benoit's professional contracts and licensing agreements respecting the commercial use of her image or the identities of her professional agents, LFP has also been denied the opportunity to prepare for and take the deposition of Plaintiff, much less identify other necessary deponents.

The deposition of and other discovery from Plaintiff is essential to LFP's ability to properly respond to her summary judgment motion. As discussed above, it is necessary to determine, *inter alia*, whether Plaintiff is the real party in interest; whether Plaintiff or Ms. Benoit intended to commercially exploit the specific images at issue in this case; and whether and to what extent Ms. Benoit's image has been commercially exploited in the past, and is intended to be exploited in the future. Ms. Benoit enjoyed a lengthy career as a model, actress and entertainer. (Cmplt. ¶ 15.)

Specifically, Plaintiff alleges (but has not proven) that she is the duly appointed administrator and personal representative of the Estate of Ms. Benoit, Cmplt. ¶ 1, and that she has the legal right to control the use of Ms. Benoit's image, *id*. at ¶ 15. However, Defendants believe that, particularly in light of her

[4] *See Parks,* 2007 WL 1482770 at *5.

long-association with professional wrestling organizations, during her life Ms. Benoit licensed or otherwise may have transferred to one or more third parties substantial rights to exploit commercially her name and likeness. (Bauer Aff. at ¶ 8.) Whether Plaintiff is in fact the owner of the right she asserts and thus is the real party in interest in this matter is not only unproven, but plainly a genuine issue of material fact which remains unresolved and a proper subject of discovery. *See, e.g., Offshore Trading Co., Inc. v. Citizens Nat. Bank of Fort Scott, Kan.*, 650 F. Supp. 1487, 1490 (D. Kan. 1987) (denying motion for summary judgment due to genuine issue of material fact whether right to sue was conveyed to plaintiff by virtue of plaintiff's arguable "agency" status and therefore whether plaintiff was real party in interest); *King Airway Co. v. Public Trustee of Routt County, Colo.*, 1997 WL 186256, at *4 (10th Cir. 1997) ("[W]e conclude the district court erred in entering summary judgment in favor of New West when there remains a genuine issue of material fact as to whether New West was in fact the owner of the claim against Rosenthal at the time default judgment was entered.").

Further, Plaintiff has also alleged, but not proven, that Ms. Benoit did not license, release or otherwise authorize Defendant Samansky to use the images he took of her "for any purpose." (Cmplt. ¶¶ 10-13.)[5] This fact -- which was assumed in and material to the Eleventh Circuit's decision that Plaintiff's Complaint should survive dismissal -- has not been admitted by LFP, is contested and unproven, and is also a proper and necessary subject for disccovery. (LFP Answer, D.I. 33 at ¶¶ 10-13.)

The genuine and material question of fact of Plaintiff's right to pursue her claim is directly germane to whether Plaintiff is entitled to judgment as to liability, and cannot be resolved without obtaining discovery known to, controlled by, or in the exclusive possession of Plaintiff. *Parks*, 2007 WL 1482770 at *5 (summary judgment improper where movant controls access to discovery needed by non-movant) (Thrash, J.). LFP is thus entitled to an opportunity to pertinent discovery from Plaintiff and others on this question of fact and, accordingly, partial summary judgment as to liability against LFP is inappropriate on this record.

For these reasons, and those set forth in the accompanying Rule 56(f) Affidavit of S. Derek Bauer, Exhibit 1 hereto, describing LFP's need for and efforts to obtain discovery to respond to Plaintiff's summary judgment motion,

[5] The Complaint does not address whether Ms. Benoit later licensed, released or otherwise conveyed rights to the images to an individual or entity other than Defendant Samansky, a question to which LFP is entitled to an answer during discovery. (Bauer Affid. at ¶ 7.)

LFP respectfully requests that, pursuant to Fed. R. Civ. P. 56(f), the Court either deny Plaintiff's motion or grant LFP an extension of time to respond to the motion for partial summary judgment filed by Plaintiff until twenty (20) days after the conclusion of the discovery period.

V. CONCLUSION

For the reasons asserted above, LFP respectfully asks the Court to deny Plaintiff's Motion for Partial Summary Judgment or, in the alternative and pursuant to Rule 56(f), suspend LFP's obligation to respond to Plaintiff's motion until twenty (20) days after the close of discovery in this matter.

Respectfully submitted this 5th day of November 2009.

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CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer
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CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Brief in Opposition to Motion for Partial Summary Judgment and In the Alternative, Request for Rule 56(f) Relief** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

This 5th day of November 2009.

/s/ S. Derek Bauer
S. Derek Bauer

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